

1 Tanya Moore, Esq. SBN 206683
 2 K. Randolph Moore, Esq. SBN 106933
 3 MOORE LAW FIRM, P.C.
 332 N. Second Street
 4 San Jose, CA 95112
 Telephone (408) 271-6600
 Facsimile (408) 298-6046

E-filing

5 Attorneys for Plaintiff
 6 Janice Evans

FILED

2011 JAN 10 P 3:45

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 N.D. CALIF. - SAN JOSE

Panel
 51
 (5)

ADR

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

9 JANICE EVANS,
 10

11 Plaintiff,

12 vs.

13 WALGREEN CO. and PRIES
 14 MARIA, LLC,

15 Defendants.
 16

CV } No 11-00134
 Plaintiff's Complaint

HRL

I. SUMMARY

19 1. This is a civil rights action by plaintiff Janice Evans ("Evans") for
 20 discrimination at the building, structure, facility, complex, property, land,
 21 development, and/or surrounding business complex known as:

22 Walgreens
 23 2680 Union Ave.
 24 San Jose, CA 95124
 (hereafter "the Store")

25 2. Evans seeks damages, injunctive and declaratory relief, attorney fees
 26 and costs, against WALGREEN CO. and PRIES MARIA, LLC, (hereinafter
 27 referred to collectively as Defendants), owners and operators of Walgreens
 28 *Evans v. Walgreen Co., et al.*

Plaintiff's Complaint

1 (“Store”), pursuant to the Americans with Disabilities Act of 1990, (42 U.S.C. §§
2 12101 et seq.) and related California statutes.

3 II. JURISDICTION

4 3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and
5 1343 for ADA claims.

6 4. Supplemental jurisdiction for claims brought under parallel
7 California law – arising from the same nucleus of operative facts – is predicated
8 on 28 U.S.C. § 1367.

9 5. Evans’ claims are authorized by 28 U.S.C. §§ 2201 and 2202.

10 III. VENUE

11 6. All actions complained of herein take place within the jurisdiction
12 of the United States District Court, Northern District of California, and venue is
13 invoked pursuant to 28 U.S.C. § 1391(b),(c).

14 IV. PARTIES

15 7. Defendants own, operate, and/or lease the Store, and consist of a
16 person (or persons), firm, and/or corporation.

17 8. Evans was diagnosed with severe multiple sclerosis over 14 years
18 ago and is confined in a wheelchair. Consequently, Evans is “physically
19 disabled,” as defined by all applicable California and United States laws, and a
20 member of the public whose rights are protected by these laws.

21 V. FACTS

22 9. The Store is a public accommodation facility serving food and
23 drink, open to the public, which is intended for nonresidential use and whose
24 operation affects commerce.

25 10. Evans visited the Store and encountered barriers (both physical and
26 intangible) that interfered with – if not outright denied – her ability to use and
27 enjoy the goods, services, privileges, and accommodations offered at the

28 *Evans v. Walgreen Co., et al.*

Plaintiff’s Complaint

1 facility. To the extent known by Evans, the barriers at the Store included, but
2 are not limited to, the following:

- 3 1) Missing and/or incorrect warning signage is installed at the parking
4 facilities;
- 5 2) Accessible parking spaces and access aisles are not properly configured
6 and/or exceed the maximum slope allowed;
- 7 3) Illegal ramps encroach into accessible parking spaces and/or access
8 aisles;
- 9 4) Parking spaces and/or access aisles reserved for persons with
10 disabilities are improperly marked and/or identified ;
- 11 5) There is no properly configured and/or identified accessible route
12 provided within the boundary of the site;
- 13 6) There are no sufficient clearances provided;
- 14 7) The public restroom provided is not properly configured and/or
15 identified;
- 16 8) Aisles with merchandise on one side are not 36" in width or aisles
17 serving both sides are not 44" in width;
- 18 9) Direction signage to restrooms is not properly posted;
- 19 10) Accessible register counters/check stands are not provided and/or
20 not properly identified/configured.

21 These barriers prevented Evans from enjoying full and equal access.

22 11. Evans was also deterred from visiting the Store because she
23 became aware that the Store's goods, services, facilities, privileges, advantages,
24 and accommodations were unavailable to physically disabled patrons. Evans
25 continues to be deterred from visiting the Store because of the future threats of
26 injury created by these barriers.

27
28 *Evans v. Walgreen Co., et al.*

Plaintiff's Complaint

1 12. Evans also encountered barriers at the Store, which violate state
2 and federal law, but were unrelated to Evans' disability. Nothing within this
3 complaint, however, should be construed as an allegation that Evans is seeking
4 to remove barriers unrelated to Evans' disability.

5 13. Defendants knew that these elements and areas of the Store were
6 inaccessible, violate state and federal law, and interfere with (or deny) access to
7 the physically disabled. Moreover, Defendants have the financial resources to
8 remove these barriers from the Store (without much difficulty or expense), and
9 make the Store accessible to the physically disabled. To date, however,
10 Defendants refuse to either remove those barriers or seek an unreasonable
11 hardship exemption to excuse non-compliance.

12 14. At all relevant times, Defendants have possessed and enjoyed
13 sufficient control and authority to modify the Store to remove impediments to
14 wheelchair access and to comply with the Americans with Disabilities Act
15 Accessibility Guidelines and Title 24 regulations. Defendants have not
16 removed such impediments and has not modified the Store to conform to
17 accessibility standards. Defendants have intentionally maintained the Store in
18 its current condition and has intentionally refrained from altering the Store so
19 that it complies with the accessibility standards.

20 15. Evans further alleges that the (continued) presence of barriers at
21 the store is so obvious as to establish Defendants' discriminatory intent.¹ On
22 information and belief, Evans avers that evidence of this discriminatory intent
23 includes Defendants' refusal to adhere to relevant building standards; disregard
24 for the building plans and permits issued for the Store; conscientious decision to
25 the architectural layout (as it currently exists) at the Store; decision not to
26 remove barriers from the Store; and allowance that Defendants' property

27 ¹ E.g., Gunther v. Lin, 144 Cal.App.4th 223, fn.6

28 *Evans v. Walgreen Co., et al.*

continues to exist in its non-compliance state. Evans further alleges, on information and belief, that Store is not in the midst of a remodel, and that the barriers present at the Store are not isolated (or temporary) interruptions in access due to maintenance or repairs.²

VI. FIRST CLAIM

Americans with Disabilities Act of 1990

Denial of "Full and Equal" Enjoyment and Use

16. Evans incorporates the allegations contained in paragraphs 1 through 15 for this claim.

17. Title III of the ADA holds as a "general rule" that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment (or use) of goods, services, facilities, privileges, and accommodations offered by any person who owns, operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

18. Defendants discriminated against Evans by denying "full and equal enjoyment" and use of the goods, services, facilities, privileges and accommodations of the Store during each visit and each incident of deterrence.

Failure to Remove Architectural Barriers in an Existing Facility

19. The ADA specifically prohibits failing to remove architectural barriers, which are structural in nature, in existing facilities where such removal is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." *Id.* § 12181(9).

20. When an entity can demonstrate that removal of a barrier is not readily achievable, a failure to make goods, services, facilities, or

² *Id.*; 28 C.F.R. § 36.211(b)

Evans v. Walgreen Co., et al.

Plaintiff's Complaint

1 accommodations available through alternative methods is also specifically
2 prohibited if these methods are readily achievable. *Id.* § 12182(b)(2)(A)(v).

3 21. Here, Evans alleges that Defendants can easily remove the
4 architectural barriers at Store without much difficulty or expense, and that
5 Defendants violated the ADA by failing to remove those barriers, when it was
6 readily achievable to do so.

7 22. In the alternative, if it was not “readily achievable” for Defendants
8 to remove the Store’s barriers, then Defendants violated the ADA by failing to
9 make the required services available through alternative methods, which are
10 readily achievable.

11 Failure to Design and Construct and Accessible Facility

12 23. On information and belief, the Store was designed and constructed
13 (or both) after January 26, 1992 – independently triggering access requirements
14 under Title III or the ADA.

15 24. The ADA also prohibits designing and constructing facilities or
16 first occupancy after January 16, 1993, that aren’t readily accessible to, and
17 usable by, individuals with disabilities when it was structurally practicable to do
18 so. 42 U.S.C. § 12183(a)(1).

19 25. Here, Defendants violated the ADA by designing and constructing
20 (or both) the Store in a manner that was not readily accessible to the physically
21 disabled public – including Evans – when it was structurally practical to do so.³

22 Failure to Make an Altered Facility Accessible

23 26. On information and belief, the Store was modified after January
24 26, 1992, independently triggering access requirements under the ADA.

25 27. The ADA also requires that facilities altered in a manner that
26 affects (or could affect) its usability must be made readily accessible to

27
28 *Evans v. Walgreen Co., et al.*

Plaintiff’s Complaint

1 individuals with disabilities to the maximum extent feasible. 42 U.S.C. §
 2 12183(a)(2). Altering an area that contains a facility's primary function also
 3 requires adding making the paths of travel, bathrooms, telephones, and drinking
 4 fountains serving that area accessible to the maximum extent feasible. *Id.*

5 28. Here, Defendants altered the Store in a manner that violated the
 6 ADA and was not readily accessible to the physically disabled public –
 7 including Evans – to the maximum extent feasible.

8 Failure to Modify Existing Policies and Procedures

9 29. The ADA also requires reasonable modifications in policies,
 10 practices, or procedures, when necessary to afford such goods, services,
 11 facilities, or accommodations to individuals with disabilities, unless the entity
 12 can demonstrate that making such modifications would fundamentally alter
 13 their nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

14 30. Here, Defendants violated the ADA by failing to make reasonable
 15 modifications in policies, practices, or procedures at the Store, when these
 16 modifications were necessary to afford (and would not fundamentally alter the
 17 nature of) these goods, services, facilities, or accommodations.

18 31. Evans seeks all relief available under the ADA (i.e., injunctive
 19 relief, attorney fees, costs, legal expense) for these aforementioned violations.
 20 42 U.S.C. § 12205.

21 32. Evans also seeks a finding from this Court (i.e., declaratory relief)
 22 that Defendants violated the ADA in order to pursue damages under
 23 California's Unruh Civil Rights Act or Disabled Persons Act.

24 VII. SECOND CLAIM

25 **Disabled Persons Act**

27 ³ Nothing within this Complaint should be construed as an allegation that plaintiff is bringing
 28 this action as a private attorney general under either state or federal statutes.

Evans v. Walgreen Co., et al.

1 33. Evans incorporates the allegations contained in paragraphs 1
2 through 15 for this claim.

3 34. California Civil Code § 54 states, in part, that: Individuals with
4 disabilities have the same right as the general public to the full and free use of
5 the streets, sidewalks, walkways, public buildings and facilities, and other
6 public places.

7 35. California Civil Code § 54.1 also states, in part, that: Individuals
8 with disabilities shall be entitled to full and equal access to accommodations,
9 facilities, telephone facilities, places of public accommodation, and other places
10 to which the general public is invited.

11 36. Both sections specifically incorporate (by reference) and
12 individual's rights under the ADA. See Civil Code §§ 54(c) and 54.1(d).

13 37. Here, Defendants discriminated against the physically disabled
14 public – including Evans – by denying them full and equal access to the Store.
15 Defendants also violated Evans' rights under the ADA, and therefore, infringed
16 upon or violated (or both) Evans' rights under the Disabled Persons Act.

17 38. For each offense of the Disabled Persons Act, Evans seeks actual
18 damages (both general and special damages), statutory minimum damages of
19 one thousand dollars (\$1,000), declaratory relief, and any other remedy
20 available under California Civil Code § 54.3.

21 39. Plaintiff also seeks to enjoin Defendants from violating the
22 Disabled Persons Act (and ADA) under California Civil Code § 55, and to
23 recover reasonable attorneys' fees and incurred under California Civil Code §§
24 54.3 and 55.

25 VIII. THIRD CLAIM
26 **Unruh Civil Rights Act**

27
28 *Evans v. Walgreen Co., et al.*

Plaintiff's Complaint

1 40. Evans incorporates the allegations contained in paragraphs 1
2 through 15 for this claim.

3 41. California Civil Code § 51 states, in part, that; All persons within
4 the jurisdiction of this state are entitled to the full and equal accommodations,
5 advantages, facilities, privileges, or services in all business establishments of
6 every kind whatsoever.

7 42. California Civil Code § 51.5 also states, in part that: No business
8 establishment of any kind whatsoever shall discriminate against any person in
9 this state because of the disability of the person.

10 43. California Civil Code § 51(f) specifically incorporates (by
11 reference) an individual's rights under the ADA into the Unruh Act.

12 44. Defendants aforementioned acts and omissions denied the
13 physically disabled public – including Evans – full and equal accommodations,
14 advantages, facilities, privileges and services in a business establishment
15 (because of their physical disability).

16 45. These acts and omissions (including the ones that violate the
17 ADA) denied, aided or incited a denial, or discriminated against Evans by
18 violating the Unruh Act.

19 46. Evans was damaged by Defendants' wrongful conduct, and seeks
20 statutory minimum damages of four thousand dollars (\$4,000) for each offense.

21 47. Evans also seeks to enjoin Defendants from violating the Unruh
22 Act (and ADA), and recover reasonable attorneys' fees and costs incurred under
23 California Civil Code § 52(a).

24 IX. FOURTH CLAIM

25 **Denial of Full and Equal Access to Public Facilities**

26 48. Evans incorporates the allegations contained in paragraphs 1 through
27 15 of this claim.

28 *Evans v. Walgreen Co., et al.*

Plaintiff's Complaint

49. Health and Safety Code § 19955(a) states, in part, that: California public accommodations or facilities (build with private funds) shall adhere to the provisions of Government Code §4450.

50. Health and Safety Code § 19959 states, in part, that: Every existing (non-exempt) public accommodation constructed prior to July 1, 1970, which is altered or structurally repaired, is required to comply with this chapter.

51. Evans alleges the Store is a public accommodation constructed, altered, or repaired in a manner that violates Part 5.5 of the Health and Safety Code or Government Code § 4450 (or both), and that the Store was not exempt under Health and Safety Code § 19956.

52. Defendants' non-compliance with these requirements at the Store aggrieved (or potentially aggrieved) Evans and other persons with physical disabilities. Accordingly, she seeks injunctive relief and attorney fees pursuant to Health and Safety Code § 19953.

X. PRAYER FOR RELIEF

WHEREFORE, Evans prays judgment against Defendants for:

1. Injunctive relief, preventive relief, or any other relief the Court deems proper.
2. Declaratory relief that Defendants violated the ADA for the purposes of Unruh Act or Disabled Persons Act damages.
3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the California Civil Code (but not both) according to proof.
4. Attorneys' fees, litigation expense, and costs of suit.⁴
5. Interest at the legal rate from the date of the filing of this action.

Dated: January 10, 2011

/s/Tanya Moore

⁴ This includes attorneys' fees under California Code of Civil Procedure § 1021.5.

Evans v. Walgreen Co., et al.

Plaintiff's Complaint

Tanya Moore
Attorney for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Evans v. Walgreen Co., et al.

Plaintiff's Complaint